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No. 93-432

In The

Supreme Court of the United States

October Term, 1993

JOSE A. MORALES (Deceased/Employee),
JULIA CORPUS DE MORALES (Widow),
JUAN ANTONIO MORALES and
DANIEL MORALES (Minor Children),

Petitioners,

v.

BARGE-WAGENER CONSTRUCTION
COMPANY (Employer)
and
ARGONAUT INSURANCE COMPANY (Insurer),

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Georgia

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE* OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

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MOTION OF *AMICUS CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONERS

NOW COMES the National Employment Lawyers Association, and files this motion for leave to file a brief *amicus curiae* in this matter.

The National Employment Lawyers Association (NELA) is a nationwide bar association of approximately 1,700 lawyers who represent the interests of individuals in the workplace. NELA was founded in 1985 to provide assistance to lawyers in protecting the rights of workers who lack the substantially greater resources possessed by employers. NELA is the nation's only professional organization that is exclusively comprised of lawyers who represent individual employees in cases involving employment discrimination, employee benefits, and other employee matters, including workers' compensation claims.

NELA advances and encourages the rights of individual employees through conferences, educational programs, publications, technical support and through legislative and legal activities. NELA has filed *amicus* briefs before in this Court as well as in the Circuit Courts of Appeals and many State Supreme Courts.

NELA is aware of this Court's rule disfavoring *amicus* briefs which are filed without the consent of all parties. NELA has attempted to secure the consent of all parties, but the Respondents, Barge-Wagener Construction Company and Argonaut Insurance Company, have refused to grant their consent. The Petitioners have consented to the filing of this *amicus* brief, and their written consent is on file with the Clerk of this Court.

NELA has prepared this brief and submits it for filing because the issues raised by the petition for certiorari are of such far-reaching public significance that they warrant further briefing and attention. NELA presents a broader perspective than the petitioners, arguing

that the public policy and purpose of workers' compensation statutes in general mandate that *certiorari* be granted and the challenged statute be struck down.

Respectfully submitted,

NATIONAL EMPLOYMENT LAWYERS ASSOCIATION

By: _____

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BRIEF *AMICUS CURIAE* OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

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II.

INTEREST OF THE *AMICUS CURIAE*

The National Employment Lawyers Association (NELA) is a nationwide bar association of approximately 1,700 lawyers who represent the rights of individuals in the workplace. NELA was founded in 1985 to protect the rights of employees who lack the substantially greater resources possessed by employers. NELA is the nation's only professional organization that is exclusively comprised of lawyers who represent individual employees in cases involving employment discrimination, employee benefits, and other employee matters, including workers' compensation claims.

NELA advances and encourages the rights of individual employees through conferences, educational programs, publications, technical support and through legislative and legal activities. NELA has filed *amicus* briefs before in this Court as well as in the Circuit Court of Appeals and many State Supreme Courts.

A significant number of NELA's members handle workers' compensation cases on behalf of injured employees. Petitioners seek a ruling on the constitutionality of a statute that denies equal protection to workers whose dependents reside outside the United States or Canada. NELA presents this *amicus* brief to the Court urging the grant of *certiorari* because the underlying purpose of workers' compensation legislation enacted throughout the United States would be subverted if the challenged statute is upheld. NELA is well suited to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

III.

REASONS FOR GRANTING THIS WRIT

A. State courts of last resort are in conflict on important questions of federal law

B. The purpose and underlying policy of workers' compensation legislation is to promote economic security for employees and their dependents in exchange for their surrender of common law remedies against their employers.

1. Our present-day workers' compensation statutes conclusively presume employees are covered.

2. The essential *quid pro quo* has not taken place where the statute denies benefits to classes of dependents.

3. The challenged statute makes it cheaper to kill a man than to maim him.

4. All rights which flow to the dependents flow from the fact of employment.

IV.

ARGUMENT

A. State Courts of last resort are in conflict on important questions of federal law.

This case presents important questions of federal law: whether a Georgia workers' compensation death benefit provision which limits recovery based on alienage violates the Equal Protection Clause and the Supremacy

Clause. The highest courts in six states are divided on these questions. The Supreme Courts of Kansas and Florida have expressly held such provisions to be unconstitutional, while the Georgia Supreme court and the Supreme Courts of New Mexico, Arizona and Utah have upheld the statutes. *Amicus* NELA incorporates by reference the arguments made by the Petitioners in their Petition for Writ of Certiorari in their entirety as they have been so thoroughly presented. *Amicus* NELA presents to the court a broader perspective on the issues and policies underlying workers' compensation legislation and demonstrates how those policies would be subverted by upholding the challenged statute.

B. The purpose and underlying policy of workers' compensation legislation is to promote economic security for employees and their dependents in exchange for their surrender of common law remedies against their employers.

The principle underlying the enactment of workers' compensation legislation in this country at the turn of the century was to provide compensation to the victims of industrial accidents in an efficient, dignified, and certain form. Workers' compensation became necessary as a result of an increase in industrial accidents and common law developments which diminished employer liability for these accidents. Comment, *The Workers' Compensation Principle: A Historical Abstract of the Nature of Workers' Compensation*, 9 Hamline Journal of Public Law and Policy 285, 286 (1989) (hereafter "Historical Abstract"). The inadequacies of the common law cause of action and

remedies available to injured worker demanded a statutory response. The law developed in the United States in response to Compensation Acts enacted in Great Britain and in Germany. The legal relationship between the employer and the employee was restructured in such a revolutionary manner by passage of workers' compensation statutes that it has been called "one of the most significant developments in Anglo-Saxon jurisprudence." Historical Abstract at 292.

Workers' compensation law is a hybrid of tort law and social insurance, as it imposes liability on the employer regardless of fault. Its purpose is to provide financial support and prevent destitution for employees and their families. The right to statutory compensation is earned by the employee and is part of his or her compensation for services rendered. *E.g., Continental Casualty Company v. Haynie,* 51 Ga. App 650, 181 S.E. 126 (1935).

The employee, in exchange for giving up his right to sue his employer for injury, is guaranteed certain benefits depending on the extent of injury or disability. The employer benefits from the arrangement as it is able to calculate more accurately the cost of doing business, being freed from the cost and unpredictability of tort suits by its employees for injuries sustained on the job. *E.g., Samuel v. Baitcher,* 247 Ga. 71, 274 S.E. 2d 327 (1981). Society realizes a reduction in unnecessary and expensive litigation, relief from the financial burden of supporting injured workers and their dependents, and the increased incentives to prevent industrial accidents by the implementation of upgraded safety equipment and procedures. *Historical Abstract* at 295.

1. Our present-day workers' compensation statutes conclusively presume employees are covered.

An important element of workers' compensation legislation is its universal coverage. In Georgia, for example, all employees are presumed to be covered and subject to the workers' compensation legislation. O.C.G.A. § 34-9-7 provides that "Every contract of service between an employer and an employee covered by this chapter, whether such contract is written, oral, or implied, shall be presumed to have been made subject to this chapter [workers' compensation law] . . . ". *Fox v. Stanish*, 150 Ga. App. 537, 258 S.E. 2d 190 (1979), *rev'd on other grounds*, 274 S.E. 2d 327 (1981) (conclusive presumption of coverage).

In exchange for providing coverage to all employees, workers' compensation statutes provide the exclusive remedy for the injured employee. Tort actions against the employer are automatically barred, limiting the injured employee and his dependents to the remedies provided in the workers' compensation statute. The Georgia bar to tort suits is found in O.C.G.A. § 34-9-11, which provides in pertinent part: "The rights and remedies granted to an employee by this chapter shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents, or next of kin, at common law or otherwise, on account of such injury, loss of service, or death . . . ". This *quid pro quo*, whereby the employee receives statutory protection in exchange for giving up his right to sue, is intended to benefit all involved. *Labelle v. Lister*, 192 Ga. App 464, 385 S.E. 2d 118 (1989).

2. The essential *quid pro quo* has not taken place where the statute denies benefits to classes of dependents.

The challenged statute, O.C.G.A. § 34-9-265(b)(5), limits the recovery of death benefits to employees whose dependents reside outside the United States or Canada to a maximum of $1,000. In contrast, employees whose dependents reside in the United States or Canada may receive virtually unlimited benefits.[1] If the statute is upheld in the face of the Petitioners' constitutional challenge, these non-resident dependents will receive a total compensation of $1,000 for the death of their husband and father upon whom they were totally dependent for their support. They are precluded from suing the employer for its negligence in causing the employee's death by operation of the statutory bar, O.C.G.A. §34-9-11, *supra*. In exchange for the sum of $1,000 they have forfeited their common law right to sue. *Amicus* NELA submits that this amounts to no exchange whatsoever, given that $1,000 is no substitute for the loss of life and lost earning power of the decedent.

---

[1] While the statute caps the benefits for a worker survived only by a dependent spouse to a maximum of $100,000 (O.C.G.A. § 34-9-265 (d)), benefits up to $250 per week continue for children through the age of majority or graduation from high school so that these benefits could equal $234,000 over 18 years; or if the child attends college full time, through age 22, totalling $286,000 over 22 years; or if disabled from working, the child could recover a lifetime of benefits totalling $845,000 through age 65.

This Court has recognized, in one of its earliest decisions addressing workers' compensation statutes, *Madera Company v. Industrial Commission*, 262 U.S. 499 (1922), that these statutes are designed to replace the lost earning power of the employee for those who are dependent upon him, whether they be residents or non-residents. *Madera*, 262 U.S. at 503. The *Madera* decision upheld a California workers' compensation law requiring payment of death benefits to non-resident aliens against a due process challenge by the employer. In upholding the California statute, the Court expressly held that employees were not any "less protected if their beneficiaries happened to live abroad". *Madera*, 262 U.S. at 504.

In examining a statutory provision similar to Georgia's, one court found that no *quid pro quo* had taken place where non-resident dependents were barred by statute from recovering any death benefits. *Pedrazza v. Sid Fleming Contractor, Inc.*, 607 P.2d 597, 601 (N.M. 1980). *Pedrazza* rejected the challenge to the New Mexico statute which denied benefits but permitted the dependents to pursue other avenues of recovery, through a tort action against the employer. While an understandable result was achieved by the New Mexico court, the impact of the *Pedrazza* holding subverts the entire purpose of the workers' compensation statutes, which is to eliminate litigation and provide the worker or his dependents with support. Permitting the non-resident alien dependents to sue subjects the employer to the uncertainty of a lawsuit, bogs the courts down with litigation, and fails to protect workers. *Amicus* NELA believes that such a result would introduce chaos into an orderly and effective system, and

can be avoided by granting the petition and striking down the statute on the grounds urged by Petitioners.

3. The challenged statutes makes it cheaper to kill a man than to maim him.

Under the challenged statute, if an employee with non-resident dependents dies on the job he is deprived of the full benefit of the exchange of his right to sue for the "protection" of the workers' compensation statutes. If, however, he is injured or disabled on the job, he would be entitled to the same benefits as his co-workers. For example, if the decedent in the case at bar had been injured instead of killed, his employer would have been required to furnish medical care reasonably necessary to effect a cure and restore the employee to suitable employment. O.C.G.A. § 34-9-200.

In addition to medical care, the injured employee receives a portion of his weekly wages, the amount depending on the severity of the injury. If an employee is "totally temporarily disabled", the benefit is two-thirds of the employees' average weekly wage, but not more than $250.00/week. O.C.G.A. § 34-9-261. This benefit can be paid for a maximum of 400 weeks, which means that the decedent could have received $100,000 towards the support of his dependents had he only been temporarily disabled instead of killed. This anomalous result breathes new life into the common law truism that "it is cheaper to kill a man than to maim him". Such a result flies in the face of modern constitutional norms of due process, and should not be upheld.

4. All rights which flow to the dependents are contingent on the fact of employment.

It is the decedent's employment that entitles his dependents to benefits. The benefits are afforded *to the worker* in exchange for giving up his right to seek redress for injuries on the job, and flow through him to his dependents. The benefits arise out of the employment relationship and are earned by the worker before injury or death. The benefits to which the decedents' dependents are entitled are not merely the largesse of some social program, they are earned by the labor of the decedent. Failure to recognize that his labor was exchanged for wages and for workers' compensation benefits in the event of his injury or death is the fundamental flaw in the opinion of the Georgia Supreme Court. The decedent worked, paid taxes, and was subjected to the same work-related risks as his co-workers. He and his dependents should receive the same benefits as his co-workers. *See, e.g. Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142 (1980); *Califano v. Goldfarb*, 430 U.S. 199 (1977); and *Frontiero v. Richardson*, 411 U.S. 677 (1973).

Unfortunately for the decedent and his family, under the Georgia statute at issue, his death meant an untimely and absolute loss of all support for his family. If this statute is upheld, persons who have been legally admitted to the United States and whose labor has contributed significantly to the economic well-being of our nation will not be treated as equal members of the community. Despite being similarly situated and making equal contributions they will receive less protection from laws which were enacted to benefit all workers.

As noted by Justice Benham in his dissent to the Georgia Supreme Court's opinion, workers such as these "wear a badge of inferiority". *Barge-Wagener v. Morales*, 263 Ga. 190, 429 S.E. 2d 671 (1993). A ruling upholding the challenged statute would undoubtedly result in unequal treatment in the workplace. It could encourage Georgia employers to hire alien workers for high-risk jobs, with the knowledge that if they should be killed in a work-related accident, only $1,000 would be owed to their non-resident dependents. Both constitutional and policy reasons dictate that these benefits be awarded to the dependents of workers on an equal basis.

V.

CONCLUSION

For these reasons the petition should be granted and the judgment of the Georgia Supreme Court should be reversed.

Dated: Atlanta, Georgia, October 18, 1993.

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